Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1994

No.

FELIPE B. CRUZ,
Petitioner,

v.

WILLIAM PERRY, SECRETARY,
DEPARTMENT OF DEFENSE,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit; Appendix

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William J. Cleary, Jr.
1853 1/2 N. Canyon Road
Los Angeles, CA 90028
(213) 465-3633
Attorney for Petitioner Cruz

QUESTIONS PRESENTED FOR REVIEW

1.) What must be shown to make a prima facie case of racial discrimination in "glass ceiling" cases? Is not such a case governed by this court's opinion in Patterson v. McLean?

2.) Where plaintiff shows that he is both Asian and Filipino, that he made the finals list of three best qualified candidates for a promotion to Resident Auditor, that he has been passed over for the promotion 8 times, and that on this occasion the successful candidate was white and had been already appointed to the position as acting director even before the Job Opening Announcement was made, has not plaintiff made a prima facie case of racial discrimination in failing to promote him?

3.) Where the Court of Appeals declines to establish the fourth legal element of a prima facie case of discrimination in failure to promote cases, may the court without violating the Due Process of law clause of the Fifth Amendment dismiss a case for failure to meet the fourth requirement? Must not such a case be remanded with instructions?

4.) May the Court of Appeals in a racial discrimination case apply a sexual discrimination precedent where the common knowledge present in racial discrimination acts to satisfy the proof missing in gender cases? Are gender cases sufficiently analogous as to be interchangeable as precedent in racial cases such that plaintiff at bar should have anticipated the application of sexual criteria to a racial claim?

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OPINIONS BELOW

The Court of Appeals' opinion is not officially reported but it is reproduced in the Appendix, Exhibit A, page 33. There is no written opinion from the trial court (Real, J.).

JURISDICTION

Jurisdiction of this court is based on 28 U.S.C. Section 1254 which permits review of final judgments of the United States Courts of Appeals, a judgment in this case filed on September 9, 1994 by the Ninth Circuit.

The original action sought damages under Title VII for racial and national origin discrimination under 42 U.S.C. Section 2000(e), et seq. and was brought in the Central District of California

which dismissed petitioner's claims of failure to promote and of retaliation.

On appeal, the Ninth Circuit affirmed the dismissal of the failure to promote claim but reversed and remanded the dismissal of the retaliation claim. There was no petition for rehearing.

Though the entire judgment is before the Court, only the failure to promote issue is pressed for review.

STATUTES, CONSTITUTIONS, ETC.

1.) 42 U.S.C. 2000e makes it unlawful to discriminate in employment based on race or national origin.

2.) The Fifth Amendment prevents the federal government from taking property without Due Process of law.

STATEMENT OF THE CASE

Petitioner Felipe Cruz is both Asian and of Filipino origin, classes protected by Title VII, 42 U.S.C. Section 2000(e). He holds a CPA certificate from the Philippines which he obtained in 1960.

After Cruz emigrated to the United States he joined, in 1978, the Defense Contract Audit Agency, Department of Defense, as an auditor, originally in the Los Angeles regional office. In 1981, Cruz transferred to the Field Detachment, which audits defense contractors, and which, due to the nature of the work, is set-off from the region behind a security curtain, or compartmented security. Nonetheless, Cruz, who entered Government service at GS-7, had reached GM-13 level, management promotions given despite the curtain.

Beginning in 1986, Cruz applied for a promotion to GM-14, Resident Auditor, a supervisory position. He applied 8 times

and each time was passed over. As a GM-13 Cruz had unofficially acted on several occasions as a GM-14, supervising 11-12 auditors and he had received several awards and commendations for his work in this capacity, both field positions in Redondo Beach and El Segundo, Los Angeles County, California.

While Cruz was temporarily - without the title - acting as GM-14 in the El Segundo office, Louis Bowers, a white and an employee of the Regional Office, was transferred by Robert Hubbard, the Southwest Regional Director, to the Acting Resident Auditor position filled by Cruz. Then, a JOA (Job Opening Announcement, 90-54) was posted inviting applications for the GM-14 position filled by Cruz, now supplanted by Bowers.

Both Cruz and Bowers applied, among at least 9 others.

William H. Reed, Director of Defense Contract Audit Agency, described the

promotion process by which he, at headquarters in Virginia, makes the selection of the successful candidate for the GM-14 position both Cruz and Bowers applied for. In this case, Reed sent to Hubbard (who had already appointed Bowers) a finals list of 11 candidates of which 7 made the Best Qualified List, including Cruz and Bowers. Hubbard, in turn, further winnowed the Best Qualified List to three candidates: Cruz, Bowers, and Moore (a black). Of these three, Hubbard chose Bowers, the candidate he had already given the job to, as the most qualified. And, acting on Hubbard's recommendation, Reed in fact appointed Bowers to the position.

Hubbard testified that he knew Bowers, as they worked together in the region, and they had fished together and shared rides to work. He met Cruz only once. (He said he knew Cruz had a Filipino CPA but did not know Cruz was

Filipino!) Finally, Hubbard justified his choice on the grounds that he had already appointed Bowers as acting Field Audit Office and Bowers had gained the experience in the job the other candidates did not have! (In fact, as noted above, Cruz had had the same "acting" experience.)

Cruz then filed a complaint under 42 U.S.C. Section 2000(e) before Judge Manuel J. Real in the Central District of California, who dismissed both the failure to promote and the retaliation claims. The Court of Appeals affirmed the failure to promote case based upon a sex-promotion case, neither cited nor relied upon by any party, but the court reversed and remanded the retaliation claim for a new trial. The Court of Appeals held that, despite meeting the McDonnell-Douglas criteria, more proof was needed for a prima facie case, the nature of which was left unspecified.

The court further noted that the prima facie case Cruz tried to make was negated by proof that another Filipino had previously been appointed to GM-14 and that Cruz had operated behind a security curtain, making him less well-known. These factors, the court implied, defeated Cruz's prima facie case, though the court also said these factors would not have negated a case if the proof - which the court would not specify - had been different.

Though finding the trial court erred in dismissing the case based on the Government's misrepresentation that Cruz's burden of proof was to show he was more qualified than Bowers, the court, based on its independent review of the record, affirmed (despite the reversible error[1], because no prima facie case had

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[1] This procedure is highly suspect. Where the appeals court cannot tell whether a case is decided on lawful grounds, the proper procedure is to remand. See Aikens, infra. A principal purpose of the Civil Rights Laws is to educate all, including judicial, officials. Riverside v. Rivera, 477 U.S. 561 (1986.)

been made under a local precedent that held that a woman who was qualified for a job which was given to a man failed to make a prima facie case of sexual discrimination. Hagans v. Clark, 752 F.2d 477, 481-482, n.1 (9 Cir. 1985) (Appendix, p. 39).

REASONS TO GRANT THE WRIT

I.

THE COURT OF APPEALS DECIDED A FEDERAL QUESTION INCONSISTENTLY WITH SETTLED LAW OF THIS COURT AND DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS

The principal reasons to grant the writ are three: (1) the court below held

that proof of the prima facie McDonnell Douglas[2] elements do not give rise to an inference of discrimination for failing to promote, a holding directly contrary to well-settled law of this court; (2) the court below also found on appeal that the reason Cruz was not promoted was that he operated behind a security curtain, a finding contrary to the allocation of proof by McDonnell Douglas, and a finding beyond the power of review of a dismissal for failure to make a prima facie case; and, (3) in affirming the dismissal for failure to make a prima facie case, the Court below relied upon one of its own precedents which was implicitly overruled by intervening law made here, and which local precedent left open for future determination an element of proof the court below required to have been proven in this case, raising an important

[2] McDonnell Douglas v.Green, 411 U.S. 792 (1973)

constitutional question of substantive Due Process. All these points are encompassed in this court's rule governing the grant of certiorari. See, Rule 10.1, (a) and (c).

The design here is to first set out the law established by this Court and then show how the court below departed from it. The Due Process issue is treated separately as the last point.

A.

A PRIMA FACIE CASE RAISES AN INFERENCE OF DISCRIMINATION WHICH RISES TO THE LEVEL OF A PRESUMPTION

Interestingly enough, the first promotion case under Title VII considered by this court was a glass ceiling case,

though that term was not widely used in 1983. (The court below treated this case as a glass ceiling claim. (Append. p. 34). In U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983), Chief Justice Renhquist held that where the proof showed the plaintiff was black, that he had been employed since 1937, that the was an outstanding manager, that he was educated beyond the level needed for the position, that he had been passed over for 8 years, and that the whites receiving the promotion were less educated than he, an irreversible case of discrimination was made, were the trial court on remand to so find. These facts parallel those at bar: Cruz is Asian and Filipino, both protected classes, he has a CPA, he qualified for the promotion 9 times, he had received numerous commendations for his supervisory work, and the white actually appointed (yea, pre-selected, infra) has less education -

no CPA. (It's true a CPA is not a requirement for the position; but, even so, where a CPA exists, it is given bonus points.) The only significant difference between the Aikens and Cruz cases is that racial remarks present in Aikens are absent here. But on this point, Justice Renhquist held direct evidence of discrimination is not required. Id., 460 U.S., at 714,n.3. The Aikens court found it unnecessary to decide whether a prima facie case was made simply by showing Aikens possessed the qualifications and that a "non-minority" candidate got the promotion, though the court did not reject this formulation. Nonetheless, Justices Blackmun and Brennan concurred in a separate opinion on the specific understanding that the majority had reaffirmed "the framework established by McDonnell Douglas...for Title VII cases." Id., at 717. The inference that the prima facie cases for failing to hire and

failing to promote are the same is, therefore, strong. (And, as the case precedes by 2 years the Hagans decision, upon which the court below relied, the validity of Hagans was already open to question when it was decided.)

What was implied in Aikens was made explicit by Justice O'Connor 4 years later in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1987), the court's second promotion case. Though the focus in Watson was whether statistics could prove a disparate impact case in failing to promote, in discussing disparate treatment, the court said, "Under the [McDonnell Douglas] scheme, a prima facie case [of racial discrimination] is ordinarily established of proof that the employer, after having rejected the plaintiff's applications for a... promotion, continued to seek applicants with qualifications similar to plaintiff's." (Emphasis added.) Id., at

986, citing Aikens at paragraph's end. (Again, no modification of the elements was suggested.)

Finally, this Court made unmistakably clear that in promotion cases the McDonnell Douglas elements apply without change. Thus Justice Kennedy held in Patterson v. McClean Credit Union, 491 U.S. 164 (1989)[3], that "...petitioner need only prove by a preponderance of the evidence that [he] applied for and was qualified for an available position, that [he] was rejected, and that after [he] was rejected respondent...filled the position with a white employee (cits.) Once the plaintiff establishes [this] prima facie case, an inference of discrimination arises. (Cits.) (Emphasis added.) Id., at 187-188. Thus what was implied in Aikens

[3] Patterson was "overruled" by statute on points related to Section 1981, a section not at issue here. Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994).

and made explicit in dicta by Watson becomes in Patterson the established law of promotion.[4]

B.

THE COURT OF APPEALS DEPARTS FROM PATTERSON

Despite noting that the Government and the trial court erred by requiring petitioner to prove he was more qualified than Bowers, the Court of Appeals nonetheless affirms based on its independent review of the record.

The Court states:

> It is true, as Cruz emphasizes, that he introduced evidence

[4] Patterson was not overruled by Rivers on this point. It remains good law for the proposition cited . As noted in the Statement of the Case, the trial court here, at Government's prompting, held contrary to Patterson that Cruz had to prove he was more qualified that Bowers to make a prima facie case. The Court of Appeals while seeing this error, refused to cite Patterson, or to reverse for this reason. This court needs to reaffirm Patterson because of the overruled aura surrounding it after Rivers.

showing that he was a member of a class of Title VII, that he was among those qualified for the promotion, and that Bowers, a white male with roughly comparable qualifications, obtained the promotion. Cruz, however, introduced no evidence that the decision impermissibly was based on national origin or race. See Hagans v. Clark 752 F.2d 477, 481-82 at n.1 (9 Cir. 1985.) (Appendix, pp. 38-39.) (Emphasis added.)

Is this not stupefying? Patterson holds that the McDonnell Douglas criteria apply to promotion cases. Patterson, supra, 491 U.S., at 186, 109 S.Ct., at 2378. But the effect of proving these criteria is to establish a prima facie case and thereby raise an inference of unlawful discrimination. Ibid.; Furnco

Construction Corp. v. Waters, 438 U.S. 567, 577. Is it not apparent that the Court of Appeals refused to recognize the inference compelled by proof of a prima facie case? That is, once the prima facie case is made a rebuttable presumption arises which precludes dismissal of the case - a presumption of unlawful discrimination. St. Mary's Honor Society v. Hicks, 113 S.Ct. 2742 (1993). This presumption arises as a matter of law and must be recognized. (Ibid.) To say, as the Court does, that McDonnell Douglas elements were proved but no evidence of discrimination was introduced is an oxymoron, revealing a complete lack of understanding of the ruling case law of this court, none of which is cited.

Instead, the Court below resorts to one of its own cases of sexual discrimination decided before Watson and Patterson which, in the facts there,

modified, unnecessarily, the fourth requirement of McDonnell Douglas in an unspecified way, and which case also held, contrary to Watkins, Patterson and St. Mary's (which were decided after Hagans) that proof of the McDonnell Douglas elements did not "necessarily" raise an inference of discrimination Hagans v. Clark, supra. Thus, in Hagans, the appeals court first holds that in a failure to promote case the fourth element of McDonnell Douglas - that the position remained open after plaintiff's rejection (in Hagans a male actually filled the position)—was not completely applicable. Patterson, however, decided 5 years later, implicitly overrules this view by holding that the fact that a white male is given the position, rather than the position remaining vacant, does meet the McDonnell Douglas, supra, 491 U.S., at 187-188, 109 S.Ct., at 2378. (This holding was foreshadowed by Watson

in 1987 where Justice O'Connor opined that prima facie case was made when plaintiff showed she was rejected for a promotional position for which her employer continued a search. Id., 487 U.S., at 986.)

Secondly, however, Hagans refused to recognize that a showing that a similarly qualified male was hired "necessarily" raises an inference of intentional discrimination. Hagans, supra, 752 F.2d, at 781-782, n.2. As pointed out above, this is not so. Just the opposite is the case. As Justice Kennedy in Patterson held, once it is shown that the position was filled by a white male, an inference of discrimination arises. Id., 491 U.S., at 187, 109 S.Ct., at 2378; see also, Furnco Construction Corp. v. Waters, supra, 438 U.S., at 577. Indeed, where the prima facie case is made, as here, the inference effectively becomes a presumption. Texas Dept. of Community

Affairs v. Burdine 456 U.S. 248, 254. Justice Scalia holds this presumption operates to produce a required conclusion in the absence of explanation. St. Mary's Honor Society v. Hicks, supra. Surely an inference rising to the level of a presumption is evidence of the fact presumed, i.e., intentional discrimination. For the Court below to hold Cruz introduced "no evidence" of discrimination is a stupefying departure from both logic and law where the record is as the court describes it! Though Hagans is otherwise distinguishable - it was remanded twice for the proof the court found missing on the third appeal - our position is that it was implicitly overruled by Patterson and it cannot be relied upon to affirm a dismissal where the Patterson elements are proved. Furthermore, we maintain, that if Hagans retains vitality, it is limited to cases

of sexual discrimination, or is limited to its facts.

C.

ADDITIONAL EVIDENCE SUPPORTED THE CHARGE

Alternatively, if the Court below can seek refuge in a McDonnell Douglas footnote which disavows an intent to specify the order of proof in all discrimination cases, such that more or different evidence must be proved, nonetheless such facts were proved here.

Cruz showed he had been passed over 8 times for this position! He also showed that Bowers, the successful candidate, and Hubbard, the regional director, were friendly, had fished together and shared rides to work. Indeed, he showed Hubbard pre-appointed

Bowers to the position as acting director even before the job opening was even announced! The inference of favoritism was strong, an inference at odds with merit promotion. (It need not be overstated that if favoritism were the real reason for the appointment, it would not meet the employer's burden to show a "legitimate, nondiscriminatory" reason for Bowers' selection. See, Patterson, supra, 491 U.S., at 187, 109 S.Ct., at 2378.) But, more to the point here, favoritism is simply the obverse side of the same coin of discrimination. Liking a white friend more than a Filipino with whom one is only barely acquainted hardly is the kind of subjective criterion permitted as a basis for promotion as it perpetuates the very stratification Title VII was meant to remedy. See, Teamsters v. United States, 431 U.S. 324, 347-348. (Correlatively, in a merit system, favoritism is not a lawful criterion for

the exercise of subjective judgment. See, Burdine, supra, 450 U.S., at 259; Watson, supra, 487 U.S., at 991.)

After all, the burden in discrimination cases is not meant to be onerous. Burdine, supra, 450 U.S., at 577. But the court below creates an insuperable burden by shunting aside the "common experience" (Furnco, supra, 438 U.S., at 577.) that makes the Patterson elements probative. By requiring additional proof of an unspecified nature, the appeals court effectively scuttles all circumstantial cases.

D.

THE FACTORS ALLUDED TO GO TO THE WEIGHT OF THE EVIDENCE, NOT ITS SUFFICIENCY

Also, the Court below makes additional contradictory statements which

defy logic. In affirming the dismissal for failure to make a prima facie case, the court says Cruz shows certain facts which would not defeat a prima facie case if the case were supported by additional, unspecified evidence! The Court effectively creates a proposition of four terms using the first term - "inference" - in two different senses. First the court holds that proof of the Patterson elements does not make a prima facie case. But, in disposing of the promotion claim, the court concludes the "inference-not-made" would not be defeated by the other facts proved if the "inference-made" were also supported by additional evidence. The court is caught in a vise of its own making, which denies petitioner Due Process of law as it is unintelligible.

The Court says Cruz shows as part of his case that he was behind a security curtain and therefore at a disadvantage

for promotions. Cruz also showed, the court continued, that one Filipino woman had actually received the position Cruz was denied. These facts, the Court says, would not defeat a prima facie case supported by other evidence, but such evidence is missing here! Thus, the Court compounds its error in several ways and by a slip of the pen betrays itself by tacitly admitting Cruz had made a case it consciously says he did not make.

Taking the points in reverse order, however, the fact that a Filipina had been promoted to the level Cruz also sought would not defeat Cruz's case because Furnco holds the obligation imposed by Title VII is to provide an equal opportunity to each applicant regardless of race, without regard to whether members of the applicant's race are already "proportionately" represented in the work force. Id., 438 U.S., at 579. Thus even if one Filipina were

proportional (a fact not shown), it should not have defeated Cruz's claim. This, too, is a marked inconsistency with the law this Court has established.

Secondly, however, the suggestion that Cruz was not promoted because of the security curtain, does not in any way derogate from the prima facie case that he made. He made the Best Qualified List and qualified for the ninth time! Yet the Court seems to say, absent other evidence, it just proves he was not known well-enough! Can this be? Especially when it is shown that Bowers was pre-appointed, the inference that the selection process was a sham, indeed was a ratification, surely gives rise to an inference that Cruz simply was not under serious consideration, not that he was unknown. At the very least, this should not be a finding made <u>on appeal</u> as it clearly calls for weighing evidence, an act outside the scope of review, even in

a 52(c) case, which limits the weighing process to the finder of fact, not its reviewer.

And, anyway, the court treated the review as from a dismissal for failure to make a prima facie, the review of which requires the court to draw all legitimate inferences in favor of the petitioner, not against him! But suggesting the reason Cruz was not appointed was because of the security curtain not only draws an inference against Cruz, it also affirmatively carries the employer's burden for a reason the employer itself did not in fact give in its evidence! (The case was dismissed after two Government witnesses had testified out of turn.) That this carries artificiality to new heights is a point which could not be lost on anyone, especially since a reason not actually given would necessarily have to be

pretextual if raised for the first time on appeal, even by the court!

II

APPLYING A CASE FACIALLY OVERRULED BY LATER CASES VIOLATES DUE PROCESS

Last, but by no means least important, Cruz wishes to protest in the strongest terms the application of the Hagans case which is at least facially overruled by later law from this court. Clearly, courts, as state agents, are subject to constitutional restraints. Florida v. Rodriguez 469 U.S. 1, 105 S.Ct. 308 (1984). Here, the appeals court resurrects the Hagans case, which under any apparent view was no longer valid, as

Hagans' pronouncements are directly contradicted by Patterson, Watson, Aikens, and Furnco. If by some act of divination, Hagans retains a vestigial vitality, it clearly runs afoul of the Fifth Amendment to deprive Cruz of a promotion based on it as there is no basis for thinking it had any application; indeed the Government did not cite it! This goes to the very heart of the judicial process: courts cannot take property by ipse dixit. Florida v. Rodriguez, supra. To resurrect Hagans now, after all the intervening cases directly contra, represents a significant change in the law which could not have been foreseen. Elemental fairness requires that, if Hagans remains good law, petitioner should be given a chance to meet Hagans' requirements, a chance Hagans herself was given not once, but twice! And, in particular, as Hagans itself leaves open the fourth requirement

under McDonnell Douglas, petitioner should be told what the law requires of him to carry his burden. Hagans perpetuates a vagueness that would not be tolerated of a statute having the same effect; indeed, insofar as Hagans leaves open and unspecified a requirement of positive law the nature of which remains a mystery until too late on appeal, it runs afoul of basic notions of fair play and substantial justice vouchsafed by the Due Process Clause. It hardly suffices to say there is a fourth element which the court cannot specify, but which the court will recognize when it sees it. A future law is no law at all.

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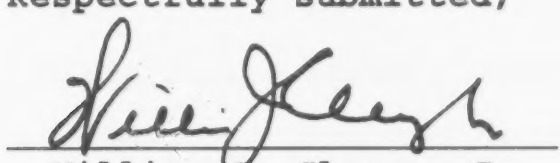
Conclusion

The petition shows important departures from and inconsistencies with established precedent of this Court. Not only does the court below refuse to recognize this authority, it resurrects authority overruled by the very authority it refuses to cite, resurrected authority which itself deliberately leaves open for future determination an element the court holds must be met in the present case, but about which the court continues to remain silent. This silence and, indeed, mystery, invites the same kind of judicial ipse dixit this Court has already found repugnant to the Constitution in matters of property. The court below also weighs the evidence on appeal finding it short of the Court's unstated requirement, as though the taking of property were a discretionary judicial power, discretion the limits of

which are in the process of discovery. This will not do as the issue is one of substantive, not procedural, Due Process. And, in any event, a discretion unbounded defines the essence of arbitrary power, the very opposite of the limited power given the Government by the Constitution, the final authority.

Date: October 4, 1994

Respectfully submitted,



William J. Cleary, Jr.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEPT. 9, 1994

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

FELIPE B. CRUZ, Plaintiff-Appellant,	NO. 93-5468 D.C. NO. CV-92-03109-R
V.	MEMORANDUM*
LES ASPIN, Secretary Department of Defense Defendant-Appellee	

Appeal from the
United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted August 1, 1994
Pasadena, California

Before: D.W. NELSON, and NOONAN, Circuit Judges, and KING,** District Judge

Felipe Cruz ("Cruz") appeals the district court's dismissal of his Title VII discrimination claims against his employer, the Defense Contract Audit Agency ("DCAA"" or "Agency"). Cruz, employed as a supervisory auditor (GM-13 level) at the DCAA, alleges that his advancement within the Agency repeatedly has been foiled in recent years, and that he has run into a "glass ceiling" based on his national origin (Filipino) and his race (Asian). Cruz asserts that, since 1986, he has been denied a promotion to a GM-14 position on at least eight separate occasion, and bases his present Title VII challenge on the DCAA's denial in 1991 of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R.36-3.

** The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

his application for a promotion to the Office Manager position at the DCAA's El Segundo office. Cruz claims that the district court erred both in concluding that he failed to establish a prima facie case of disparate treatment, and in concluding that he failed to establish a prima facie case on his claim that his DCAA supervisors illegally retaliated against him for filing an EEOC complaint. We have jurisdiction under 28 U.S.C. Section 1291. We affirm in part, reverse in part, and remand for further proceedings.

I. FAILURE-TO-PROMOTE CLAIM

Cruz contends that the district court erred as a matter of law in concluding that he failed to establish a prima facie case of disparate treatment. We disagree. Although certain portions of the transcript of the oral hearing on

the Rule 52(c) motion support Cruz's position, after an independent review of the record we conclude that the district court's written finding that "Mr. Cruz presented no evidence that either race or national origin was a factor on Mr. Cruz's not receiving the...promotion," adequately supports the court's judgment. Cf. Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380, 1385-86 (9th Cir. 1986) (noting that although a district court's findings are reviewed for clear error even where the court adopts a party's proposed findings verbatim, "'close scrutiny' of the record is appropriate" in such circumstances) (internal citation omitted), cert. denied, 480 U.S. 906 (1987).

At the oral hearing on the Rule 52(c) motion, the DCAA asserted that Cruz's failure-to-promote claim should be dismissed because Cruz had not "shown that he's more qualified for the position

than Louis Bowers [the individual who was promoted]." After counsel for Cruz claimed that no such showing was required to establish a prima facie case, the court emphasized that "[Cruz is] not the only qualified applicant here. There are [seven]." The court thus appears to have accepted the employer's contention that a plaintiff in a failure-to-promote case must show that he or she was better qualified than the person who was promoted. If it were clear that the district court had accepted the DCAA counsel's argument and had based its ruling solely on Cruz's failure to establish that he was better qualified than Bowers, we would have to reverse. We know of no disparate case imposing such a requirement. The test, rather, is whether the plaintiff has offered evidence sufficient to "'give rise to an inference of unlawful discrimination.'" Yartzoff v. Thomas, 809 F.2d 1371, 1373

applied for a GM-14 position, Zennie Pangilinan, had been promoted to such a position two years previously. Although these latter facts alone would not be sufficient to defeat an inference of discrimination if the inference were supported by other evidence, the record here is entirely devoid of such evidence.

II. RETALIATION CLAIM

Cruz contends that the district court erred in concluding that he failed to establish a prima facie case of retaliation. We agree.

"A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a

causal link between the protected activity and the employer's action." Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). There is no question that Cruz's decision to file an EEOC complaint is a protected activity under Title VII. Cruz also established that his performance rating dropped for the first time ever within months of filing the complaint, thereby carrying his burden of showing that he suffered an adverse employment decision. See, id. at 1376 (stating that a performance rating drop constitutes an adverse employment decision within the meaning of Title VII.) The only remaining question is whether Cruz's evidence established the necessary causal link between his EEOC filing and the adverse evaluation.

At the oral hearing on the Rule 52(c) motion, the district court suggested that Cruz's only evidence of a causal link was that Warren Wright,

Cruz's immediate supervisor, had raised his voice against him. The court also suggested that it did not believe the testimony of Rogers, who had testified that Wright was out to get Cruz. The court did not, however, question the credibility of Cruz or of any of his other witnesses. In its written conclusion of law, the court mentions only Wright's alleged "yelling" and the alleged impropriety of the investigation by the Inspector General's office. Cruz's evidence, however, was far more extensive. We conclude that, even disregarding the evidence discounted by the district court, that evidence established the causal link necessary to give rise to an inference of unlawful retaliation.

Cruz testified that, immediately after filing the EEOC complaint, he informed Wright of his action. Cruz claimed that Wright told him that he

"didn't have any leg to stand on" and suggested that his rating could decrease as a result of having filed the complaint. Cruz also detailed what he described as unusually close supervision from Wright and his successor and a pattern of retaliatory harassment in the ensuing months. He explained that, within two or three months of his filing of the complaint, Wright had his unit perform a special, time-consuming "floor check" despite considerable time pressure to finish scheduled audits. He further claimed that Wright gave conflicting instructions to him and the people working under him. He noted that one auditor was transferred out for 3-4 weeks in June 1991 and that another was transferred out permanently in July, leaving his unit shorthanded. Finally, Cruz introduced evidence tending to show that his performance rating decrease was arbitrary. He testified that, prior to

the filing of his EEOC complaint, Wright had given him a superior rating. He also testified that his rating was decreased despite the fact that he had completed 31 of 41 scheduled audits, whereas Roger Samuel, another supervising auditor at El Segundo who completed only 6-8 of 40 audits, did not have his rating decreased.

Under established Ninth Circuit precedent, this evidence suffices to establish the final element of Cruz's prima facie case of retaliation. See Yartzoff, 809 F.2d at 1356 ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.").

Accordingly we reverse the district court's judgment in favor of the DCAA on Cruz's retaliation claim and remand the case to the district court. On remand, the DCAA should have the opportunity to present legitimate, nondiscriminatory reasons for its challenged actions. If it does so, Cruz must be afforded an opportunity to show that those reasons were pretextual and that the DCAA's action were based on impermissible considerations. See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

III. JURY TRIAL

The Supreme Court's decision in Landgraf v. USI Film Products, 114 S.Ct 1483 (1994), forecloses Cruz's claim that he was entitled to a jury trial. Cruz concedes that the jury trial provision of the Civil Rights Act of 1991 would be

applicable in this case only if the provision applies retroactively. In Landgraf, decided after the briefs were filed, the Supreme Court expressly ruled that the provision, set forth in Section 102 of the Act, does not apply retroactively.[1]

CONCLUSION

For the reasons stated above, we affirm the district court's judgment in favor of the DCAA on Cruz's failure-to-promote claim, but reverse the court's dismissal of his retaliation claim. REVERSED and REMANDED.

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[1] In his "Notice of New Authority," filed on May 27, 1994, Cruz makes the argument that "the rule [set forth in Landgraf] does not apply to cases arising in California." This argument borders on the frivolous. Cruz has presented no basis upon which this court conceivably could distinguish Landgraf.